No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Respondents believe that this case presents one question, which they state as follows: Whether the court of appeals correctly affirmed, *per curiam,* the thorough and well-reasoned district court decison that the student assignment plan of the Jefferson County, Kentucky public schools -- which provides that the schools shall be racially integrated -- complies with the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT

A. The Jefferson County Public Schools

The Jefferson County, Kentucky public school district (the "School District") encompasses almost all of the area of Kentucky's largest unit of local government, the Louisville/Jefferson County Metro Government.[1] The schools within the School District (the "Jefferson County Public Schools" or "JCPS") include 87 elementary, 23 middle, and 20 high schools, and alternative and special education schools and centers. Stipulation of Facts ("Stip.") pars. 10-16, Joint Appendix ("JA") 22-24. About 97,000 students were enrolled in JCPS in 2003-2004. They included about 5,000 preschool, 42,500 elementary, 21,650 middle, and 24,750 high school students, and 3,100 students in the other schools and centers. Stip. par. 34, JA 29.

The Jefferson County Board of Education (the "Board") has general control and supervision of JCPS under state law. The Board has seven members who are elected for four-year terms from separate voting divisions in non-partisan elections in even-numbered years. The Board meets at least monthly in meetings that are open to the public, and decides questions presented to it by majority vote. The members of the Board receive a minimal per diem for their service. Stip. pars. 6-7, JA 21; Kentucky Revised Statutes ("KRS") 61.810, 160.160, 160.200 to 160.280.

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[1] The Metro Government is the consolidated countywide government for an area of about 400 square miles with about 700,000 residents. The Metro area includes several smaller cities with limited government functions. One such city operates a 400-student K-8 public school system. *See Hampton v. Jefferson County Board of Education*, 72 F. Supp. 2d 753, 759, n. 13 (W.D. Ky. 1999) ("*Hampton I*"). All other Metro area public school students are within the School District.

JCPS is governed by the Kentucky Education Reform Act, 1990 Ky. Acts. c. 476 ("KERA"), a statute enacted in response to a state court decision which held unconstitutional the previous statewide system of elementary and secondary schools. KERA set statewide learning goals, designed an assessment program to measure schools' progress in reaching the goals, and created a process to hold schools accountable for their performance. To implement KERA, the Kentucky Department of Education ("KDE") designed a statewide model program of studies, set academic expectations and student performance standards, and created a core academic content for the assessment program. Stip. pars. 41-43, JA 31-32. The assessment program does not compare one school's average scores to another school's averages; it measures each school's progress in reaching its own goal. Transcript ("Tr.") 3-45 (Peabody). The Board also is subject to the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq*. ("NCLB Act"), which employs a similar assessment and accountability program.

All JCPS schools are basically equal. The Board's funding allocation formula, approved by KDE, provides financial resources to all schools in the same manner. Stip. par. 27, JA 25; Stipulation Exhibits ("Stip. Exh.") 16-17; Tr. 4-80 to 82 (Hardin). All schools are basically equal in their instructional staff. All principals and teachers are hired and assigned in the same manner. Stip. pars. 29-30, JA 27-28. Some schools offer programs not available at other schools, but all schools are basically equal in the curriculum that they use in compliance with state law, and in the quality of the instruction that they provide. Tr. 2-152 to 161 (Todd), 4-92 (Castillo), 4-103 to 106 (Rose), 4-139 to 142 (Burks); Stip. Exhs. 29-31. All schools are subject to the same criteria with regard to student progression, promotion, and grading. Tr. 2-157 (Todd); Stip. Exh. 32. All schools are basically equal

in matters such as discipline, dress codes, homework policies, and extracurricular activities. Stip. par. 56, JA 36.

The Board prepares a biennial plan as a condition to the receipt of funds from KDE. The plan contains a statement of the Board's overarching educational goals for JCPS. The Board's current statement includes four goals, two of which expressly require racial integration:

> Goal One (Student Achievement): All JCPS students will become critical thinkers and lifelong learners who are academically prepared in a racially integrated environment to be successful in the post-secondary education programs or careers of their choice.
>
> Goal Two (Student Atmosphere): All JCPS students will be safe, supported, respected, and confident in racially integrated schools, classrooms, and student activities.

Stip. par. 8, JA 21; Stip. Exh. 5.

Jefferson County housing is substantially segregated along racial lines. Tr. 3-77 to 81 (Rodosky); Defendants' Exhibits ("Dft. Exh.") 17, 18 (JA 99), 19 (JA 100), 20-22.[2] The assignment of all JCPS students to "neighborhood schools" would result in a substantial number of racially segregated schools. Tr. 3-127 to 128 (Rodosky).[3] *See also*, *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358,

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[2] There has been some increase in racially integrated housing since the 1970s; the Board believes that the continuous maintenance of racially integrated schools throughout the period may have assisted in that. Tr. 3-83 to 84 (Rodosky).

[3] That method of assignment also would create capacity issues in up to 40% of JCPS school buildings, because of the mismatch between school locations and population movement since desegregation began in the School District. Tr. 3-128 to 129 (Rodosky).

371, n. 29 (W.D. Ky. 1999) ("*Hampton II")* (Board's evidence of probable resegregation absent the use of race in student assignment). The School District, however, exists in a mid-sized metropolitan area with many mostly white suburbs within its boundaries, and has a majority of white students. Tr. 2-72 to 74 (Todd). Racial integration is a realistic goal for JCPS. The Board's success in meeting the goal has given it a national reputation. *See, e.g.*, Dft. Exh. 72, p.117; *Hampton II*, *supra*, at 369-70. The Board's current process of assigning students among its schools to meet the goal is stated in a student assignment plan adopted in 2001 (the "Plan"). Stip. Exh. 74, JA 75-96.

B. The Student Assignment Plan

The sole petitioner in this case is a parent whose complaint in district court arose from the denial of her request to transfer her son from one elementary school to another. This Court will better understand the issues presented by the denial of the request if it has some knowledge of the overall student assignment process. Respondents will, therefore, describe the operation of the Plan as it affects all students.

The Plan is a complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools through a system of "managed choice." The strategies include automatic approval of majority-to-minority transfer requests; the grouping of elementary schools into clusters to facilitate integration; the adjustment of school attendance areas and programs as necessary to facilitate implementation of the Plan; programs and systems for orientation, training, administration, monitoring, and accountability; and broad racial guidelines. Stip. Exh. 74, pp. 5-8, JA 81-83; Tr. 2-129 to 131 (Todd). The Plan provides that each school (except preschools, kindergartens, alternative and special education schools, and self-contained special education units) shall have

not less than 15% and not more than 50% black students. Stip. Exh. 74, p. 5, JA 81. Of the students subject to the Plan, 34% are black and 66% are "other." Stip. par. 36, JA 30.[4]

The student assignment process begins with school boundaries. Each elementary, middle, and high school, except for magnet schools,[5] has a designated geographic attendance area. Each such school is the "resides school" for all students who reside in its geographic attendance area. There are no selection criteria for admission to a resides school, except attainment of the appropriate age and completion of the previous grade. Stip. pars. 61, 63, JA 37-38.

The elementary schools, except for magnet schools, are grouped into 12 clusters of from five to 10 schools each. All of the schools in the cluster that includes a student's resides school are "cluster resides schools" for the student. For example, a student whose resides elementary school is one of the nine schools in the Coleridge-Taylor cluster has one resides school and nine cluster resides schools. Stip. par. 62, JA 37; Stip. Exh. 43.

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[4] The terms "black" and "other" were first used in a desegregation decree issued by the district court in 1975. Stip. Exh. 66. There has been some increase in other ethnic minorities in Jefferson County since then, but those terms still reflect the community's overall racial reality. Tr. 2-131 to 132, JA 120 (Todd). For that reason, the district court thought it more accurate to use those terms in its opinion. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 840, n. 6 (W. D. Ky. 2004), Appendix to Petition for Certiorari ("Pet. App.") C-11.

[5] There are five magnet elementary, three magnet middle, and four magnet high schools. The Brown School, which includes grades kindergarten through 12 in one building, is also a magnet school. Stip. par. 69, JA 40; Stip. Exh. 46.

The resides schools are supplemented by magnet schools, magnet programs, and optional programs. Magnet schools do not have attendance areas, and admit students only by application. Magnet and optional programs are special programs offered at 10 of the 82 resides elementary, 12 of the 20 resides middle, and 15 of the 16 resides high schools. Even students who reside in the attendance area of a resides school which offers a magnet or optional program must apply for admission to the program. Stip. pars. 67, 70-72, JA 39-41; Stip. Exhs. 45, 46.

From February through March each year, elementary students can submit applications to attend a school other than their resides school. They can make up to four choices: a first and second choice among their cluster resides schools, and a first and second choice among magnet schools and schools that offer magnet or optional programs. All elementary students are asked to submit such an application, but not all do. A student who does not submit an application is assigned to his or her resides school or to another school within its cluster. Stip. pars. 64-66, JA 38-39; Dft. Exh. 3.

From November through January each year, middle and high school students likewise can make a first and second choice among magnet schools and schools that offer magnet or optional programs. Students entering the ninth grade can apply to attend any high school. A student who does not submit an application is assigned to his or her resides school. Stip. pars. 66, 73-75, JA 39-41; Dft. Exhs. 4, 5.

Applications to magnet schools, and magnet and optional programs, are evaluated on the basis of available space in the school, the racial guidelines, and the applicable criteria for the school or program.[6] Elementary cluster applications are

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[6] The applicable criteria vary by school and program but may include (1) objective criteria established by the school or program, such as an essay,

evaluated on the basis of space and the guidelines. Typically, parents are notified of their child's assignment by May. Students may then apply to transfer to a school other than their assigned school (except a magnet school, or entry into a magnet or optional program) for any valid reason. Transfer applications are typically based on day care arrangements, medical criteria, family hardship, student adjustment problems, and program offerings.

In 2003-2004, about 10% of JCPS students submitted applications to attend a magnet school, or a magnet or optional program; about half of the applications were granted.[7] In 2002-2003, about 7% of the students (including some who had previously submitted choice applications) applied for a transfer; the majority of the requests were granted.[8] The Board provides transportation to students who attend a school other than their resides school through a choice or transfer application.[9]

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recommendations, attendance data, course grades, or test scores; (2) for a magnet or optional program, available space in the program; (3) for a middle school math-science-technology magnet program, one of the magnet traditional program schools, or the Brown School, position on a computer-generated random draw list; and (4) for the Brown School, a residential ZIP code that will make the student body representative of the entire county. Stip. par. 77, JA 42.

[7] Stip. pars. 79, 82-84, JA 43-44. The Board does not have records which show how many unsuccessful applicants later submitted a successful transfer application.

[8] Including transfer requests granted in previous years, about 7% of students attended a school other than their resides school on a transfer in 2002-2003. Stip. pars. 34, 81, 86-88, JA 29, 43-45.

[9] Stip. pars. 111-119, JA 53-55. The Board must transport students for reasons of distance from school, safety or disabilities. KRS 158.110. Most students would receive transportation even in the absence of the "managed choice" system. Tr. 4-127 to 134 (Caple).

An elementary student has three levels of choice, for up to five schools. Middle and high school students have two levels of choice, for up to three schools. Nevertheless, most middle and high school students do not submit a choice application and are assigned by default to their resides school.[10] Nearly all elementary students attend either their resides school or their first choice cluster resides school.[11]

Because the failure to submit an application is itself a choice, all students participate in "managed choice" at least by default. Although less than half of students submit applications, most applications are granted, with percentages of success varying among schools and programs in ways that are not unexpected. This aspect of the Plan provides a "safety valve" for those who wish to make a choice, and is an important tool for the Board's goal of offering a racially integrated education to students from every part of the Metro area.

Racial integration in resides middle schools and high schools, which enroll the great majority of middle and high school students, is accomplished primarily through the drawing of attendance areas, some of which have non-contiguous boundaries. Tr. 2-84 to 85, 2-90, 2-166, JA 123 (Todd), 4-96 (Castillo). In elementary schools, it is accomplished by the cluster plan, in which students choose from among five to up to 10 basically equal schools, and are almost always assigned either to their first or second choice

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[10] Stip. pars. 79-81, JA 43. In 2003-2004, about 50% of high school students and 67% of middle school students attended their resides school. Stip. pars. 34, 89, JA 29, 45.

[11] In 2003-2004, about 95 or 96 percent of elementary students attended either their resides school or their first choice cluster resides school; the rest were assigned to a cluster resides school by the Board. Tr. 2-98 to 99, 5-109 to 112 (Todd).

school. At application schools and programs, decisions are influenced by space and program limitations much more often than by the racial guidelines. Many parents have long understood, and the district court agreed, that the racial guidelines have minimal impact in this process, because they "mostly influence student assignment in subtle and indirect ways." Tr. 2-166 to 168, JA 122-24, 5-109 to 114 (Todd); Pet. App. C-18.

The number and percentage of Jefferson County students enrolled in JCPS declined dramatically after the implementation of the desegregation decree. Tr. 3-94, JA 132 (Rodosky); Dft. Exh. 30, JA 104. The student assignment plan adopted by the Board in 1984 substantially modified the court-ordered student assignment process and began a series of periodic revisions that have enhanced stability and predictability, expanded parent and student choice, and relaxed the racial guidelines. *Infra,* n. 13. The percentage of Jefferson County students attending public schools has stabilized since 1984, and the percentage of *white* students in JCPS has likewise remained stable, despite a relative decline in white births. Tr. 3-93 to 96, JA 131-32, 3-100 to 102 (Rodosky); Dft. Exhs. 27-30, JA 101-04.

The Board periodically polls students, graduates, parents, and the community to determine their attitudes about JCPS. The results show very strong student, parent and community support for a student assignment plan that provides for choice by parents and students and maintains racially integrated schools. *See* Stip. Exhs. 23, 65, 75; Dft. Exhs. 37, 38 (JA 106), 72, p. 118 and p. 138, nn. 21-24; Tr. 3-123 to 125, JA 134-35 (Rodosky), 5-28 to 29, JA 145 (Orfield). "It's unambiguously true that Jefferson County citizens believe that [racial diversity is] a desirable characteristic of school systems." Tr. 3-182, JA 139 (Kifer).

C. The Petitioner

Crystal Meredith ("Meredith" or "Petitioner") is the mother of Joshua McDonald. In 2002, Joshua's resides school was Breckinridge - Franklin Elementary ("BFE"). BFE is in the Young cluster. Meredith did not submit an application in early 2002 to indicate a choice for Joshua's enrollment in kindergarten for 2002 - 2003. In August 2002, Meredith asked that Joshua be enrolled at BFE in kindergarten. BFE is a "year-round" school which had started classes in July; by August, it had no space for late enrollees. Joshua was assigned to Young and was enrolled in kindergarten there. Meredith then applied to transfer Joshua to Bloom Elementary, which is not in the Young cluster. Because the application was denied under the guidelines, and Meredith neither appealed the denial nor applied for a transfer to another school, and did not in early 2003 indicate a choice other than Young for Joshua's enrollment for 2003 - 2004, Joshua attended Young for the first grade at the time of the hearing. Stip. par. 5, JA 20-21; Plaintiffs' Exhibit ("Plt. Exh.") 15, JA 97.

Meredith testified that she wanted her son to attend Bloom instead of Young because Bloom offered an ungraded primary school program. Tr. 1-49 (Meredith). In fact, KERA requires every elementary school to have an ungraded primary program; KDE regulations dictate the content of the program. KRS 158.031; 704 KAR 3:440; Tr. 2-69 to 70, 2-195 (Todd). Meredith also testified that it took Joshua 20 minutes to get to Young from home, and that she had to drive him. Tr. 1-50 (Meredith). In fact, the Board made bus transportation available to Joshua. Tr. 2-195 (Todd).

D. Procedural History

Although Meredith and other plaintiffs filed this case in 2002, the district court's decision is better understood with

knowledge of another case filed in district court by different plaintiffs in 1998. The earlier case finally resolved the status of a desegregation decree issued by the district court nearly three decades earlier. In that sense, the history of this case began in the 1970s.

In 1972, several plaintiffs filed lawsuits which challenged the *de jure* segregation that existed in the public schools of the former Louisville Independent school district and the then Jefferson County school district. In 1973, the Sixth Circuit held in the consolidated litigation that "all vestiges of state-imposed segregation must be eliminated" in both school districts. *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, 489 F. 2d 925, 932 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F. 2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). In April 1975, the two school districts were merged by KDE into one, the School District. *See Cunningham v. Grayson*, 541 F. 2d 538, 539 (6th Cir. 1975). In July 1975, the Sixth Circuit issued a writ of mandamus that required the district court to enter a desegregation decree. *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975). The district court complied within the month. Stip. Exh. 66.

The district court's decree established racial guidelines for all schools in the School District and required countywide busing by a method known as the "alphabet plan," because the students transported from their "home" school to an "away" school were selected by the first letter of their last name and their grade level.[12] The decree was implemented in

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[12] The decree required all elementary schools to have black enrollment in the range of 12% to 40%, and all middle and high schools to have black enrollment in the range of 12½% to 35%. Stip. Exh. 66, p. 3. Because assignments were randomly made by last name and grade level, most students did not attend the same school at each school level (elementary,

September 1975. The School District unsuccessfully appealed to the court of appeals, *Cunningham v. Grayson*, *supra*, and filed a petition for a writ of certiorari which was denied. *Board of Education of Jefferson County v. Newburg Area Council, Inc.*, 429 U.S. 1074 (1977).

The court-ordered student assignment plan remained in effect, with some modifications by the district court, for nearly a decade. Stip. Exhs. 67-69. In 1984, and again in 1991 and 1996, the Board modified the student assignment provisions of the decree. The Board gradually replaced the "alphabet plan" with methods of student assignment that provided students with greater continuity and stability, offered additional choices to parents and students, and relaxed the original racial guidelines but maintained racially integrated schools.[13] The Board took those actions without court approval, because it believed that it was no longer subject to the decree.[14] In 1999, however, the district court held when

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middle, and high) through all grades of that level.

[13] The 1984 plan provided for students to attend one middle school and one high school without change in assignment, enhanced the programs offered at an historically black high school, established a countywide magnet school at another high school, and established racial guidelines for all schools of 10% above and 10% below the countywide average. Stip. Exh. 71. The 1991 plan, which was largely prompted by the passage of KERA, provided for students to attend one elementary school without change in assignment, and established racial guidelines of 15% to 50% for elementary schools, and 15% above and 15% below the countywide average for middle and high schools. Stip. Exh. 72. The 1996 plan established racial guidelines of 15% to 50% for all schools, created a staff unit to ensure implementation of the plan, and provided for monitoring and reporting to ensure accountability. Stip. Exh. 73. *See also*, Tr. 2-77 to 83 (Todd).

[14] In a 1978 order, Judge Gordon said that as a result of the decree as amended, "the Jefferson County Schools are unitary." Stip. Exh. 67, p. 24. In a 1985 order, Judge Ballantine denied the motion of the original

the question was presented to it that the Board remained under court supervision. *Hampton I*, *supra*, at 783.[15]

The district court dissolved the decree the following year, at the request of the *Hampton* plaintiffs, when it resolved their complaint. The district court held in *Hampton II* that Central High School, which before the decree was an all-black school and became a magnet school in 1993, could not be subject to the racial guidelines in the 1996 plan.[16] The Board adopted the Plan in response to *Hampton II*. The Plan provides that three other magnet schools are not subject to the guidelines because they, like Central, offer unique programs. Stip. Exh. 74, p. 3, JA 79.

This case was filed by Meredith and three other parents (together with Meredith, "Plaintiffs"). The Plaintiffs other than Meredith claimed that their children were unlawfully

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plaintiffs to reopen the litigation. He noted that the applicable decisions of this Court provide that "once the constitutional violation has been remedied, ... the federal courts must not interfere with the traditional functions of the school board." Stip. Exh. 70, p. 8.

[15] The district court noted that '[t]his conclusion may seem surprising." *Id*. at 754. The *Hampton I* opinion contains a detailed history of desegregation in Jefferson County from the 1950s through the filing of the *Hampton* complaint. *Id*. at 755-67.

[16] Central offers a "magnet career academy" program that prepares students for careers in business, law, medicine, and computer technology. Stip. Exh. 45, p. 18. No other high school offers a similar program. The district court held that denial of admission to Central to the *Hampton* plaintiffs involved an unconstitutional use of race to allocate a limited government benefit among competing applicants. 102 F. Supp. 2d at 381 ("When it decides who may attend Central, JCPS uses a racial classification that denies a benefit, causes a harm, and imposes a burden on unsuccessful African-American applicants.").

denied entry into magnet traditional program schools.[17] Meredith claimed that her son was denied entry into his "neighborhood school." All Plaintiffs requested injunctive relief and damages. Pet. App. E-1; Record ("R.") 8, 15, 16.

The district court held that the Plan satisfied the "compelling interest" requirement of this Court's equal protection decisions. The district court also held that the Board's use of race in student assignments satisfied the "narrow tailoring" requirement of those decisions, except for the use of race-separate lists in the application process at magnet traditional program schools.[18] The district court ordered the Board to change that process, but it did not grant any other relief to any Plaintiff. Pet. App. C-78.

Only Meredith appealed. The court of appeals affirmed in a *per curiam* opinion which held, "Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose." *McFarland v. Jefferson County Public Schools*, 416 F. 3d 513, 514 (6th Cir. 2005) *cert. granted*, 126

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[17] Those schools are countywide magnet schools which provide instruction in a "traditional" environment. They are provided by the Board with the same financial, instructional, curricular, disciplinary and extracurricular resources, materials, services and policies as every other school. Moreover, eight resides schools provide a traditional or structured learning environment. Stip. pars. 98-100, JA 48-49; Pet. App. C-29. The Board did not exempt the magnet traditional program schools from the racial guidelines in response to *Hampton II*, because they are not unique.

[18] The use of separate lists at those schools was not required by or even described in the Plan; it was simply the method chosen by staff to implement the Board's goal of racial integration. The Board changed the magnet traditional program school application process for 2005-2006 to comply with the district court's order, without changing the text of the Plan. Thus, that part of the district court's decision is not at issue here.

S. Ct. 2351 (2006); Pet. App. B-1. The court of appeals denied Meredith's subsequent petition for rehearing. Pet. App. A-1.

SUMMARY OF ARGUMENT

The district court correctly held that the Plan satisfies the requirements of the Equal Protection Clause. Under well-established principles, the Plan must further a compelling governmental interest and must be narrowly tailored to meet that interest. This Court most recently applied those principles to higher education admissions policies in *Grutter v. Bollinger,* 539 U.S. 306 (2003); when applied in the much different context of the student assignment plan of a public elementary and secondary school district, those requirements are easily satisfied by the Plan.

The Board presented overwhelming evidence that the Plan achieves the Board's compelling interest in providing a competitive and attractive public school system, maintaining community support for JCPS, and preparing students for life in a democratic and racially diverse society. Petitioner and the other Plaintiffs presented no meaningful evidence to the contrary.

The use of race in the Plan is narrowly tailored because the student assignment process is flexible and uses race in a limited and permissible manner; the racial guidelines lack the attributes of a quota; the student assignment process does not cause undue harm; the Board has considered, and in large part uses, race-neutral alternatives to achieve its compelling goals; and the Plan is subject to periodic review by democratic processes.[19]

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[19] Some readers of this summary and the argument below may imagine that they "hear the thud of square pegs being pounded into round holes." *Parents Involved in Community Schools v. Seattle School District No. 1*,

ARGUMENT

I. The Board Has A Compelling Interest In Maintaining Racially Integrated Schools.

A. The Board's Interest Must Be Considered In Light Of The Unique Importance Of Elementary And Secondary Schools In Our Society

Every state of the United States requires its children to receive an elementary, and at least a partial secondary, education.[20] In most states, the provision of such an education by the legislature is a constitutional requirement.[21] Nearly 90 percent of the nation's school children attend public

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426 F. 3d 1162, 1193 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006) (Kozinski, J., concurring). Respondents agree that here, as in that case, "there is something unreal about … efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here." *Id*. Respondents argued below that the Plan is subject to, at most, intermediate scrutiny. *See* Post-Hearing Brief of Defendants, R. 54. Judge Kozinski proposed "robust and realistic rational basis review" as an alternative to strict scrutiny. 426 F. 3d at 1194. Nevertheless, the Plan satisfies the test of strict scrutiny. Indeed, it could be said -- recognizing that several dissenting Justices in *Grutter* questioned whether the facts in that case justified the result -- that the Plan satisfies the test better than the law school's admissions program did. *See* pp. 21, 25, 30, n. 28, 37, n. 30, 42-43, 45, *infra*.

[20] Education Commission of the States, Compulsory School Age Requirements (August 2006), *available at* http://www.ecs.org/clearinghouse/64/07/6407.htm (last visited October 4, 2006). Kentucky has such a requirement. KRS 159.010.

[21] Education Commission of the States, Constitutional Language: State Obligations for Public School Funding (August 2002), *available at* http://www.ecs.org/clearinghouse/38/62/3862.htm (last visited October 4, 2006). Kentucky has such a requirement. Ky. Const. § 183.

elementary and secondary schools.[22] In almost every state, the expenditure of funds for those schools is the largest single item in the state general fund budget.[23] All of this is true because public elementary and secondary schools play a unique role in our democracy.

The core mission of public elementary and secondary schools is to educate children in the civic values and skills that they need to become active and capable citizens. This Court has recognized that public school teachers "play a critical part in developing students' attitudes toward the government and understanding of the role of citizens in our society" because they "inculcat[e] fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979). In addition to this important political role, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). "[T]he significance of education to our society is not limited to its political and cultural fruits. The public schools

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[22] U.S. Department of Education, National Center for Education Statistics, Characteristics of Private Schools in the United States: Results from the 2003-2004 Private School Universe Survey (March 2006) p. 2, *available at* http://nces.ed.gov/pubs2006/2006319.pdf (last visited October 4, 2006). In Kentucky, about 90 percent of students attend public schools. *Id.* Table 23 and KDE, Kentucky Education Facts Page (November 2005), *available at* http://www.education.ky.gov/KDE (last visited October 4, 2006).

[23] National Association of State Budget Officers, The Fiscal Survey of States (June 2006), *available at* http://www.nasbo.org/Publications/PDFs/FiscalSurveyJune06.pdf (last visited October 4, 2006). In Kentucky in recent years, from 41 to 48 percent of the general fund budget has been so spent. KDE, Kentucky Board of Education Meeting Notes (June 4-5, 2003), av*ailable at* http://www.education.ky.gov/KDE (last visited October 4, 2006).

are an important socializing institution, imparting those shared values through which social order and stability are maintained." *Plyler*, *supra,* at 222, n. 20. Public school teachers perform "a task that goes to the heart of representative government," because public schools are an "assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach, supra,* at 77. Thus, "education has a pivotal role in maintaining the fabric of our society." *Plyler, supra*, at 203.

The most significant notice by this Court of the importance of public elementary and secondary schools to the nation was *Brown v. Board of Education,* 347 U. S. 483 (1954). This Court aptly summarized the central role of those schools in an often quoted passage:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493. In holding that state-sponsored school segregation is unconstitutional, this Court in *Brown* considered "public education in the light of its full development and its present

place in American life throughout the Nation," not merely its status in 1868. *Id.* at 492-93.[24]

KERA provides that students in Kentucky's elementary and secondary schools shall acquire, among others, the capacities of "[k]nowledge to make ... political choices" and "[u]nderstanding of governmental processes as they affect the community, the state, and the nation." KRS 158.645. KERA further provides that the schools shall develop their students' ability to "exhibit[] the qualities of altruism, citizenship, courtesy, honesty, human worth, justice, knowledge, respect, responsibility and self-discipline" and "[b]ecome responsible members of a family, work group or community, including demonstrating effectiveness in community service." KRS 158.6451. These capacities and abilities surely are among the "fundamental values necessary to the maintenance of a democratic political system." *Ambach*, *supra*, at 77.

The district court correctly noted that when a government decision is influenced by race, the Equal Protection Clause requires that "[t]he interest asserted must be examined and approved in each case in light of the particular context in which it is asserted." Pet. App. C-38, citing *Grutter*, 539 U.S. at 327. The district court suggested that *Brown* may not be directly relevant to its decision in a legal sense, but it concluded that "*Brown*'s original moral and constitutional

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[24] This Court noted in *Brown* that public elementary and secondary schools had become more important in American life since the adoption of the Fourteenth Amendment, with increased emphasis on a longer school year, more years of schooling, and compulsory attendance. *Id.* at 489-90. Since 1954, the importance of those schools to our nation's place in the global economy has been emphasized many times by the executive and legislative branches, *e.g.*, the President's education summit with the nation's governors in 1989; the passage of Goals 2000: Educate America Act (P.L. 103-227) in 1994; and the passage of the NCLB Act in 2002.

declaration has survived to become a mainstream value of American education." Pet. App. C-45. The district court properly defined the context within which it examined the Board's interests by reference to *Brown, Plyler* and other relevant decisions of this Court.[25]

B. The Plan Creates More Competitive And Attractive Public Schools And Causes Broader Community Support For JCPS

The district court noted that one who proposes to use race should first "define with precision the interest being asserted," and it correctly described the precise interest of the Board as follows:

> To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown*'s promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools;

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[25] The district court also noted recent and relevant legislative action: that Congress affirmed the value of racial integration by enacting the NCLB Act; and that in offering financial assistance for magnet schools, Congress noted that "[i]t is in the best interests of the United States … to continue the Federal Government's support of … local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds … to ensure that all students have equitable access to a high quality education that will prepare all students to function well in … a highly competitive economy comprised of people from many different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4). Pet. App. C-44, n. 34.

and (4) broader community support for all JCPS schools.

Because this Court recently considered the strength of educational interests in *Grutter*, the district court appropriately looked to that decision for guidance. The district court noted at the hearing, however, that while a public law school has a valid interest in the internal benefits of racial diversity, a public elementary and secondary school system may have a greater and perhaps more valid interest in its external benefits. Tr. at 5-74 to 76, JA 155 to 157. The district court found in the record certain important benefits of the Plan "that were not relevant in the law school context but are relevant to public elementary and secondary schools." Pet. App. C-4. The district court concluded that racial integration in JCPS provides an important and valid external benefit to the Board and the community: "Integrated schools strengthen and make the entire school system more attractive." Pet. App. C-50, n. 40.

Elementary and secondary education is mandatory under state law, but parents and students can choose not to attend public schools. KRS 159.010, 159.030. Many families, though, are not able to pay nonpublic tuition. The Board's goals for JCPS are thus shaped in several ways by the existence of strong competition from private and parochial schools. Pet. App. C-49; Tr. 3-95, JA 133 (Rodosky), 4-91 (Castillo). The Board wishes to provide a public school system in which each school is succesful and all schools can give a quality education to every child the Board receives from the community. Tr. 1-121, JA 119 (Daeschner).

The desegregation decree was legally necessary, but it had painful short-term consequences for the community and the Board. The district court noted when it issued the decree that "certain individuals in our community have publicly declared

their intended resistance, by the use of force if necessary, to prevent the implementation of our Judgment and Plan of desegregation." Stip. Exh. 66, p. 22. Indeed, "[c]ommunity resistance was extremely intense, and this transition was one of the most difficult experienced by any city at the height of the desegregation era." Dft. Exh. 72, p. 116. *See also Hampton I*, *supra*, at 755 ("A full telling of that story … would necessarily describe the confusion and outrage at Judge Gordon's busing order which seemed to tear this community apart as it sent children from their own neighborhoods to places that many of both races had never seen."). Dft. Exh. 30, JA 104, charts the substantial decline in JCPS enrollment that followed the entry of the decree.

The decree was effective, but it had educational disadvantages; notably, it did not provide for continuity in assignment through all grades at each school level. Moreover, the decree by its very nature did not provide for any student choice. The educational flaws of the decree were magnified by the passage of KERA; its emphasis on stability, parental participation, assessment and accountability were not served by the lack of continuity in elementary students' assignments under the then-existing plan. *See* Stip. Exh. 72, pp. 1-4. Since 1984, the Board has slowly and carefully converted the decree into a complex but fair student assignment plan which meets the educational needs of JCPS and accomplishes the decree's "goal of preventing racially identifiable schools [but] in a far less burdensome manner than the mandatory alphabetical busing plan." *Hampton I*, *supra*, at 777.

Each revision of the student assignment process was preceded by extensive community outreach and input. Each revision was influenced by the needs and desires conveyed to the Board by parents, educators, interested groups of stakeholders, and the public at large. *See* Stip. Exh. 70, p. 3

(1984 revision involved "assistance and advice of a representative citizens committee and other interested persons and organizations"); Stip. Exh. 72, pp. 7-10 (in 1991 revision, "[a]ll persons and groups who are affected by, or interested in, the subject of student assignment in the school district have been given the opportunity to be heard."); Stip. Exh. 73, pp. 2-4 (1996 revision involved recommendations by representatives of many civic and advocacy groups, a public forum, and a telephone survey of parents); Stip. Exh. 74, p. 3, JA 78 and Dft. Exh. 38, JA 106 (2001 revision involved public forums, a parent opinion survey, a public opinion survey, and discussions with outside experts). *See also*, Tr. 2-79 to 80 (Todd).

The Plan has prevented the resegregation that inevitably would result from the community's segregated housing patterns and that most likely would produce many schools that might be perceived as "failing." By design, the Plan "creat[es] a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White." The Plan thus "invest[s] parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole." Pet. App. C-49. Because the Metro area has a countywide system of public schools that are truly unitary, it has avoided much of the race-based strife and race-conscious decisions that characterize other metropolitan areas with highly segregated public schools. In Jefferson County, public and private choices about where families will live, where companies will locate, where teachers will teach, how funds will be allocated among schools, and the like can be made on a *less* race-conscious basis than in those communities.

The Board, responding to its constituents in a manner that exemplifies effective democratic decision-making, has

skillfully converted a blunt and controversial desegregation decree into a nuanced and educationally sound student assignment plan that is broadly accepted by the community. It is an accomplishment of which the people of Jefferson County are rightly proud. *See, e.g.*, Tr. 3-61, JA 130 (Corbett). *See also Hampton I*, *supra*, at 755 ("Finally, [the story] would describe a school community which in many respects came together for a common purpose and worked at understanding one another well enough to overcome all these traumatic events. In doing so, at the very least, the Jefferson County schools created something positive and workable.").

The district court correctly held that the Plan furthers the Board's goals of more competitive and attractive public schools and broader community support for all schools in the system. Indeed, because "not one witness came forward to offer [the] view ... that integrated schools are not valuable to the system as a whole," the district court's finding with regard to this interest of the Board was "compelled." Pet. App. C-50, n. 40.

C. The Plan Provides Important Educational Benefits To JCPS Students

1. The Plan Teaches Racial Tolerance And Diminishes Racial Stereotypes.

The district court observed that while "the Board has articulated broader concerns in the different context of public elementary and secondary education," the interests identified by the Board "overlap with those of the Michigan Law School at the individual student level." Pet. App. C-37. The district court found that the Plan provides important and valid internal benefits to the Board and its students that are quite similar to those found by this Court in *Grutter*.

This Court held in *Grutter* that the admissions policy of the law school resulted in an "important and laudable" educational benefit to the school and its students -- promotion of cross-racial understanding, breaking down racial stereotypes, and enabling a better understanding of persons of different races. 539 U.S. at 330. If that is a compelling benefit for law schools and their students, it is even more so for the Board and its students. Justice Scalia noted in dissent in *Grutter* that law students are not graded on this skill, "[f]or it is a lesson of life rather than law" which should be learned in "institutions ranging from Boy Scout troops to public-school kindergartens." 539 U.S. at 347 (Scalia, J., dissenting). Indeed, the sections of KERA cited above require that students acquire the capacities and abilities to "Work[] and Play[] Well with Others." *Id.* And, not surprisingly, JCPS students *are* graded on those capacities and abilities. *See* Stip. Exh. 32, pp. 8, 14.

Racial integration significantly advances the goal of teaching students how to participate in a democracy that has formed a single society out of many diverse people. *See, e.g.*, Tr. 1-81, JA 114 (Haddad); 1-114, JA 118 (Daeschner); 2-134, (Todd) 3-30, JA 128 (Peabody); 4-92 to 93 (Castillo), 5-61 (Orfield). In fact, racial integration of the students in elementary and secondary schools *is* effective participation by students of all racial and ethnic groups in the part of the nation's civic life that is "the very foundation of good citizenship." *Brown*, *supra*, at 493; *Grutter*, 539 U.S. at 332 ("[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.")

The Board offered evidence that the benefits of racial integration in elementary and secondary schools include the important human lessons identified in *Grutter* and that they are best learned at an early age. *See*, *e.g.*, Tr. 3-207 (Kifer)

("It's a part of the American ethos that says we ought to learn to live together. What you are talking about is democracy.") JCPS students obtain those benefits from the Plan. *See* Tr. 3-124, JA 134 to 135 (Rodosky) (2002 University of Kentucky survey of 1997 JCPS graduates); Dft. Exh. 72, pp. 129-37 (similar 2000 survey of JCPS students by Harvard Civil Rights Project; "diversity has a positive impact on learning, on student attitudes, and on important democratic principles."). In the face of this evidence, "Plaintiffs offered nothing to the contrary." Pet. App. C-47, n. 36. The district court correctly held that "the benefits of racial tolerance and understanding are equally as 'important and laudable' in public elementary and secondary education as in higher education." Pet. App. C-46 to 47, quoting *Grutte*r, 539 U.S. at 330.

2. The Plan Prepares Students For Life In A Racially Diverse Society.

Attending racially diverse schools "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals" because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330. That conclusion is not limited to graduates of institutions of higher education who work for Fortune 500 companies and as military officers; it applies equally to graduates of JCPS who work, for example, in a local dry cleaning plant. Tr. 3-59, JA 129 (Corbett) ("[I]f we want our children to live and work in a world where they are going to be dealing with people who don't necessarily look and/or sound like they do, then what better way to prepare them for that than to be in that setting in the school building because they are going to get it in the workplace, and my company is a perfect example of how that's going to happen").

In a county in which the great majority of students attend public schools and about one-third of the population is black, the entire community has a substantial interest in a public school system whose graduates are prepared for a racially diverse workplace. JCPS students are so prepared. *See* Tr. 3-125, JA 135 (Rodosky) (2002 University of Kentucky survey of 1997 JCPS graduates regarding preparation for a diverse workplace; "88 percent of the graduates felt prepared or well-prepared"); Dft. Exh. 72, pp. 129-37 (similar 2000 survey of JCPS students by Harvard Civil Rights Project; "[o]ver 85 percent of all students believe that they are prepared to work in a diverse job setting [and] over 90 percent of all students report that they would be comfortable working for a supervisor of a different racial or ethnic background."). The district court correctly held that students educated in racially integrated schools "are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at the job," and that this benefit of racial integration is one that was "precisely … articulated and approved of in *Grutter*." Pet. App. C-46.

3. The Plan Supports The Board's Goal Of Increasing The Academic Achievement Of All Students

Petitioner would measure the relative educational success of elementary and secondary schools primarily, if not exclusively, by scores on standardized reading and mathematics tests.[26] It is clear from the argument above that

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[26] Petitioner's cursory brief in this Court simply states, "If educational benefit is the true test of compelling interest, than [sic] JCPS fails their own test." Brief of Petitioner ("Pet. Brf.") p. 8. Respondents believe, given the arguments made by Plaintiffs in district court, that Petitioner means that JCPS has not closed the achievement gap between white and

improvement in such test scores is not the only governmental purpose of elementary and secondary schools. Nevertheless, that form of student achievement is important to the Board, because assessment of and accountability for schools' progress on such tests is a key component of state and federal legislation.[27]

The Board offered evidence that racial integration provides substantial academic benefits to black students without harming white students: "[A] vast body of research" shows that "black students gain in terms of educational achievement measured by test scores from desegregated experiences" but "there is not a significant effect on white students one way or another in terms of test score outcome." Tr. 5-14, JA 140 (Orfield). Moreover, the black-white achievement gap in JCPS has been narrowed on each successive state-mandated test. Tr. 3-160 to 162, JA 135-36 (Rodosky). The Board's success in dealing with the gap was cited by the Broad Foundation when it named JCPS as one of the top five school districts in the nation in 2003. Tr. 2-71 to 72 (Todd).

The district court was well aware of "the huge body of conflicting opinion about the [achievement] benefits of racial integration." Pet. App. C-48, n. 37. Because the evidence in

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black students. *See, e.g.*, Reply Brief for Plaintiffs (R. 56); Tr. 4-143 to 149 (Plaintiffs' cross-examination of Joseph Burks).

[27] *See* KRS 158.6455; 20 U.S.C. § 6311(b). KERA recognizes, however, that not all abilities that schools are required to develop can be captured in a test score. *See* KRS 158.6453(1) (state assessment shall not measure a student's ability to become a self-sufficient individual or to become a responsible member of a family, work group or community). The "report card" that KERA requires for each school includes not only performance on the state assessment but also nonacademic achievement (attendance, retention, dropout rates and transition to adult life) and school learning environment, including parental involvement. KRS 158.6453(7).

this case and *Hampton II* "seems to suggest that African-American achievement has improved substantially" and because "Plaintiffs completely failed to introduce evidence that integration is only a neutral factor," the district court concluded that the Board has valid reasons for believing that the Plan may aid student performance. Pet. App. C-49, n. 39. The district court correctly held that this is an "equally compelling" benefit of the Plan for the Board. Pet. App. C-47.

D. The Plan Is An Educational Judgment By A Locally Elected Government Body That Is Responsive To Its Constituents

1. The Plan Deserves The Deference That Federal Courts Traditionally Give To Educational Judgments Of Local School Boards

This Court held in *Grutter* that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer" because the admissions policy involved "complex educational judgments in an area that lies primarily within the expertise of the university." 539 U.S. at 328. The district court likewise gave deference to the Board's judgment that the Plan would improve its schools and the education of the children in them.

The deference that this Court gave to the law school in *Grutter* was based on "expansive freedoms of speech and thought associated with the university environment" that are grounded in the First Amendment. 539 U.S. at 329. A university's freedom to make judgments includes the selection of its student body; deference is due the university's choice of students who will produce the "robust exchange of ideas" that fulfills its mission. *Regents of University of California v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). The district court thought that "[i]n the different context of

public school education, that concept of deference is not relevant." Pet. App. C-40, n. 31.[28]

This Court has many times in many contexts applied a different concept of deference to the educational judgments of elementary and secondary school officials. *See, e.g.*, *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273 (1988) (this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."); *Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.") When this Court held that *de jure* racial segregation was unconstitutional, it gave local school boards the principal role in implementing the holding: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." *Brown v. Board of Education*, 349 U.S. 294, 299 (1955). Likewise, in decisions about the dissolution of desegregation decrees, this Court has emphasized the democratic benefits of local control of schools. *See, e.g., Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 248

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[28] The district court also noted another distinction between higher education and elementary and secondary schools that is relevant to the degree of deference, if any, that is compatible with strict scrutiny in either context. The district court observed that "Justice Thomas has argued that deference is contradictory to the very idea of strict scrutiny. … For instance, he said that while a state may opt to create an elite law school, it has no compelling interest to do so." Pet. App. C-42, n. 32, citing *Grutter*, 539 U.S. at 362 (Thomas, J., dissenting). For the Board, however, "[e]ducating the community's children is not optional." Thus, "strict scrutiny and limited deference are compatible here." *Id*.

(1991). ("Local control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs.")

This deference that this Court gives to local school boards is grounded in the vital civic role of their schools. This Court recognized the fundamental importance of those schools to the nation in decisions such as *Brown*, *Plyler* and *Ambach*, *supra*. Yet, "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." *Plyler*, *supra*, at 223, citing *San Antonio Independent School District v. Rodriguez ,* 411 U. S. 1, 28-39 (1973). Because the right to receive an education is not a fundamental individual right, "federal and state courts have uniformly rejected the contention of a constitutional right to attend a particular school." *Johnson v. Board of Education of the City of Chicago*, 604 F.2d 504, 515 (7th Cir. 1979), citing *McDaniel v. Barresi*, 402 U.S. 39 (1971), and other authorities.

This concept of deference has been stated by this Court in cases involving issues similar to that presented here. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), this Court said that "School authorities have wide discretion in formulating school policy.... As a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Likewise, in *Bustop, Inc. v. Board of Education of City of Los Angeles*, 439 U.S. 1380, 1382-83 (1978), then-Justice Rehnquist denied a request to enter an injunction against the busing of students to achieve racial balance: "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." (emphasis

in original) And, in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), this Court reinstated the authority of the City of Seattle to implement a voluntary desegregation plan to eliminate racial imbalance in the schools, noting that "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." *Id.* at 473.

The district court correctly concluded that it could give deference to the Board's statement of its interests under the principles outlined above: that public elementary and secondary schools perform a vital role in American life; that the fundamental importance of those schools to government does not, however, create a corresponding individual right to receive an education or to attend a particular school; and that decisions about those schools are best left to local boards of education. Those principles are especially applicable in a case involving student assignment: a task that is both very basic, because every school board must perform it, and very difficult, because it requires the board to balance a complex blend of demographics, facility planning, communitywide and neighborhood aspirations, school and program popularity, institutional and individual student stability and predictability, and the like -- all while meeting state and federal expectations for annual progress toward legislated goals. It is a task that requires educational judgments that are more wisely made by school boards than by courts.

Petitioner has relied, here and below, on this Court's decision in *Missouri v. Jenkins*, 515 U. S. 70 (1995). *See*, *e.g.*, Petition for Writ of Certiorari 19. That case had different facts than this one, but it presented a similar fundamental question: When does a Constitution framed on principles of federalism and separation of powers require the federal courts to intervene in the affairs of a local board of education? The answer that Justice Thomas gave to that

question in the concurring opinion cited by Petitioner is equally applicable here:

> The desire to reform a school district, or any other institution, cannot so captivate the judiciary that it forgets its constitutionally mandated role. Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.

Id. at 138 (Thomas, J., concurring).

2. The Constitution Should Not Prevent The Board From Continuing To Make Voluntarily An Educational Judgment That Was First Imposed On It By The Constitution

The district court noted that "[i]t would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law." Pet. App. C-42. The brief *amicus curiae* of the United States takes that odd position here.

The United States concedes that government has a compelling interest in eliminating or reducing racial isolation when it is a product of *de jure* segregation. Brief of the United States, p. 15. The United States contends, however, that this worthy objective--pursued by the Board continuously and in good faith for nearly 30 years by methods substantially the same as those decreed by the district court in 1975--became non-compelling the instant the district court issued its decision in *Hampton I*. On and after that day, under this

theory, the Board could pursue racially integrated schools only by race-neutral means. *Id*. at 16.

One of the requirements for dissolution of a desegregation decree is proof that the school district has complied with its requirements in good faith. *Dowell*, *supra*, at 249-50. The position of the United States here is indeed odd, given that the reason for requiring a showing of good faith in connection with the dissolution of a decree is to predict the likelihood that the board will in the future adhere to the principles that caused the decree to be issued in the first place. *Hampton II*, *supra*, at 380. "If the Constitution somehow prohibits a school board from maintaining a desegregated school system, the good faith factor becomes something of a sham." *Id*.

The dissolution of a decree means only that, in addition to proof of the school district's good faith compliance, the "vestiges of past discrimination had been eliminated *to the extent practicable*." *Dowell, supra*, at 249-50 (emphasis added). That is somewhat less than the standard suggested by the United States here. Brief of the United States at 10 ('when all vestiges of such discrimination have been *eradicated*") (emphasis added). In any event, desegregation is an important first step but it was not the ultimate goal of those who filed *Brown* and subsequent litigation, and it is not the goal of the Board. That goal was and is racial integration.[29] That goal

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[29] "Although the terms desegregation and integration are used interchangeably, there is a great deal of difference between the two.... [D]esegregation alone is empty and shallow. Desegregation is eliminative and negative, for it simply removes legal and social prohibitions. Integration is creative...more profound and far reaching than desegregation. Integration is the positive acceptance of desegregation and the welcomed participation of Negroes into the total range of human activities. Desegregation then, rightly, is a only a short range goal." "Ethical Demands for Integration", *A Testament of Hope: The Essential Writings of Dr. Martin Luther King, Jr*. (1968), 118.

will not be maintained by dismantling the very processes that caused the School District to become desegregated. The Board has properly continued to achieve that goal by "perpetuat[ing] without interruption, although with adjustment, the racial composition guidelines originally put in place by [the decree]." *Hampton I*, *supra*, at 77.

The position taken by the United States ignores this Court's previous statements about the discretionary ability of a local board of education to achieve racial integration. *Supra*, pp.31-32. This Court has never withdrawn those statements. *See Comfort ex rel. Neumyer v. Lynn School Committee*, 283 F. Supp. 2d 328, 390, n. 102 (D. Mass. 2003), *aff'd*, 418 F. 3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005). ("Notably, the Supreme Court has never even suggested that a voluntarily-adopted forced busing plan would be illegal."). The voluntary continuation of the framework established by the decree has accomplished important institutional, social and academic interests of the Board. There is nothing here that should cause this Court to withdraw those statements now.

E. Plaintiffs Offered No Meaningful Evidence Contrary To The Board's Stated Interests

The briefs *amicus curiae* on both sides of this case discuss many studies about the abstract benefits, or disadvantages, of racially integrated public elementary and secondary schools. That material is interesting, and often thought-provoking, but it is not controlling here. This is a real case with a real record about a particular school system. This Court's conclusion whether racially integrated schools are a compelling governmental interest *of the Board of Education of Jefferson County, Kentucky* must ultimately be based on this record. The Board presented overwhelming factual evidence and expert opinion that racial integration *in the Jefferson County*

Public Schools furthers compelling educational, cultural, social and economic interests of the Board and the community. "Purely as a matter of evidence, JCPS more than carried its burden on this issue. … Plaintiffs offered nothing to the contrary." Pet. App. C-47, n. 36.

F. Conclusion

The district court had "no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition." Pet. App. C-38. Indeed, the district court said that "[t]he arguments favoring the Board's compelling interest are so objectively overwhelming that deference is immaterial to the result here." Pet. App. C-43. For the reasons set out above, that holding is clearly correct.

II. The Plan Is Narrowly Tailored

A. The Plan Is Specifically And Narrowly Framed Within Its Context To Accomplish Its Purpose

"[T]he means chosen to accomplish the [Plan's] asserted purpose must be "specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 333, quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The purpose of this requirement is "to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.*, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

If this case presented a newly adopted program of public employment, public contracting, or even university admissions, the possibility of illegitimate motive might exist and this Court might need to search the record closely to find or disprove it. Here, in light of the Board's long history of good faith efforts to continue to provide racially integrated schools, the district court correctly concluded that "the

Board's policy of maintaining an integrated school system is sincerely held and not intended to disadvantage any race." Pet. App. C-53. *See Hampton II, supra*, at 369-70. Moreover, "Plaintiffs did not introduce any evidence in either the *Hampton* case or this case that suggested that the Board's motives were illegitimate, improper or insincere in any manner." Pet. App. C-53, n. 42.[30]

"Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327, quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]t is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."). This Court said that its narrow tailoring inquiry in *Grutter* "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education" because "the very purpose of strict scrutiny is to take such 'relevant differences into account.'" 539 U.S. at 334, quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). The district court similarly evaluated the Plan "in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and

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[30] The district court thought that the legitimacy of the Board's motives also had a bearing on the validity of the Board's interests. "In his *Grutter* dissent, Chief Justice Rehnquist said that, absent an adequate explanation of the law school's interest, its attempts to reach a 'critical mass' were nothing more than unconstitutional racial balancing." Pet. App. C-53, citing *Grutter*, 539 U.S. at 378-87 (Rehnquist, J., dissenting). "[T]o use race for this purpose fails for want of a compelling reason." Pet. App. C-52. Here, given the precise statement of the Board's interests and the overwhelming supporting evidence offered by the Board, "no one honestly can say that JCPS is asserting an interest in racial balancing merely for its own sake." Pet. App. C-53.

Gratz." Pet. App. C-54. When the Plan is viewed in light of the Board's statement of its interests, the narrow tailoring inquiry has a distinctly different calibration than it did there.

Some of Petitioner's *amici curiae* have noted, correctly, the difference between the goals of "diversity" in higher education and racial integration in elementary and secondary schools. They fail to understand, however, what the difference means to the narrow tailoring inquiry here. They argue that that the yardstick that was used to measure the programs in *Bakke* and *Grutter* does not, indeed cannot, fit the Plan. As the Second Circuit explained, they ask the wrong question:

> [T]he District Court asked whether the Program is narrowly tailored to achieve the goal of "true diversity" ... when the appropriate inquiry ... is whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation. The difference in these two frameworks is not mere semantics. If reducing racial isolation is -- standing alone -- a constitutionally permissible goal, as we have held it is under the *Andrew Jackson* cases, then there is no more effective means of achieving that goal than to base decisions on race. ... [T]he cases cited by the District Court in support of its decision that the use of race alone in the Program was not narrowly tailored ... only address the efficacy of employing strictly racial classification to achieve "true diversity." Those decisions are, therefore, inapplicable to the present situation where the Program's aim, as initially found by the District Court and affirmed by this Court today, is precisely to ameliorate *racial* isolation in the participating districts.

Brewer v. West Irondequoit Central School District, 212 F.3d 738, 752-53 (2d Cir. 2000) (emphasis in original).

The elements of the Plan might not constitutionally "fit" a university admissions program whose goal is to attain a broadly "diverse" student body. *Grutter*, 539 U.S. at 334, citing *Bakke*, 438 U.S. at 315. They clearly fit an elementary and secondary student assignment plan with the narrower but equally compelling goal of maintaining racial integration in all its schools. Colleges and universities pursue their goal of "diversity" with strategies that are designed to attract "a critical mass of underrepresented minority students." *Grutter*, 539 U.S. at 335. The Board does not need to attract minority students. The JCPS student body will be at least one-third black -- and even more, if the Board is not successful in pursuing strategies that attract white students. *See* Tr. 3-95 to 98 (Rodosky); Dft. Exhs. 31, 32 (JA 105), 33-36.

The district court considered, in this context, each of the measures of narrow tailoring applied by this Court in *Grutter*. Pet. App. C-55 to C-56, citing *Grutter*, 539 U. S. at 334-35, 336, 341 and 339. The district court properly calibrated each of those measures to fit the distinct issues presented by the use of race in elementary and secondary education, and correctly held for the reasons discussed below that the Plan is a specifically and narrowly framed strategy to accomplish the Board's purpose. Pet. App. C-69.[31]

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[31] In reaching its conclusion, the district court adopted Justice Kennedy's position that "the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). The district court did not give "even limited deference to the Board's implementation of its goals." Pet. App. C-54 to 55.

B. The Plan's Use Of Race Is Limited And Not Pretextual, And The Student Assignment Process Operates Flexibly

The district court addressed *Grutter's* "requirement of individualized consideration," 539 U.S. at 336, by noting that the Plan operates in the "totally different context" of an elementary and secondary school system which "does not have the goal of creating elite and highly selective school communities" but instead seeks to "create more equal school communities for educating all students." Pet. App. C-62. The process of "holistic review" urged by Petitioner simply does not fit this context.

The majority in *Grutter* and Justice Powell in *Bakke* imposed the "individualized consideration" requirement to ensure that a university's stated goal of "diversity" is not a pretext for the use of race as the sole criterion for decision in choosing any applicant. *Grutter*, 539 U.S. at 337; *Bakke*, 438 U.S. at 316. Thus, race cannot guarantee the admission of a black student instead of a farm boy from Idaho or a Bostonian; at most, race or geographic origin may "tip the balance" for one of them. To keep the university at least facially honest in implementing the process, it must disclose the "holistic" criteria that it proposes to use to admit and exclude applicants. When an elementary and secondary school district's openly stated (and constitutionally compelling) goal is racial integration of an existing student body among all its schools, there is no need to guard against pretext and thus no need even to require the use of such criteria. *See Parents Involved in Community Schools, supra*, at 1183 ("[i]f a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner.").

Attendance in elementary and secondary schools is mandatory, and the Board is required to educate every child in its schools to a statewide standard. The concept of merit-based selection in those schools is properly the exception rather than the rule. Only a relatively small number of the 90,000 students subject to the Plan are "evaluated as an individual" by the Board in any year in the context of an application to attend a school other than a resides or cluster resides school. Moreover, many of those applications are submitted to magnet schools that since *Hampton II* have been exempt from the racial guidelines. *Supra,* p. 13. Within this framework, the decisions on the relatively small number of choice and transfer applications can be and are made for reasons other than race, and "[e]ven where race does 'tip' the balance in some cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part." Pet. App. C-70 (emphasis in original). Thus, race is not the "defining feature" of any student's assignment. Pet. App. C-69. Petitioner's argument that race is the "sole factor" used to assign students in JCPS, Pet. Brf., p. 4, completely misapprehends the actual operation of the Plan.

The real purpose of the individualized consideration requirement is to ensure that an admissions process remains "flexible." *Grutter*, 539 U.S. at 334-37. In the context of higher education, flexibility is provided by a nuanced admissions process that does not define applicants by race or ethnicity. *Id*. at 337. In the much different context of JCPS, the same if not a greater degree of flexibility is provided by an even more complex but equally workable process that similarly submerges race in a mix of other factors. As in *Grutter* and *Bakke* "race is simply one possible factor among many, acting only occasionally as a permissible 'tipping' factor." Pet. App. C-63. For these reasons, the district court

correctly held that the "Plan incorporates some sufficient form of individualized attention in the assignment process." Pet. App. C-61.

Much attention has been paid by Petitioner and her *amici curiae* to the numbers in the Plan. Petitioner argues that the racial guidelines in the Plan constitute a "hard-core mechanized race-designated quota system." Pet. Brf., p. 5. The district court correctly rejected this argument. Under the decisions of this Court, a quota "has a precise target, and it insulates some applicants from competition with other applicants." Pet. App. C-57, citing *Grutter*, 539 U.S. at 335, quoting *J.A. Croson Co.*, *supra*, at 496, and *Bakke*, *supra*, at 317. The Plan does neither.

The racial guidelines encompass a range of 35 percentage points, from about 20% below to about 15% above the average JCPS black enrollment. The actual black enrollment among JCPS schools in 2003-2004 varied widely within this range. At elementary schools, it ranged from 20.2% to 50.4%; at middle schools, from 23.5% to 49.9%; and at high schools, from 20.1% to 49.5%. Stip. Exh. 21. The district court noted that "only about 30% of all schools show a racial mix within even five percent of either side of the system wide average," indicating "a widely dispersed range in Black students among JCPS schools rather than a precise target." Pet. App. C-58. Indeed, this Court held in *Grutter* that the variance in the percentage of minorities in the law school's classes from 1993 to 1998 of 13.5 to 20.1 percent was "a range inconsistent with a quota." 539 U.S. at 336. The district court observed that "the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College

[cited in Justice Kennedy's dissent in *Grutter* as not involving a quota] or Michigan Law School." Pet. App. C-59.[32]

The district court found that the Plan does not insulate "each category of applicants with certain desired qualifications from competition with all other applicants," quoting *Grutter*, 539 U.S. at 334. Pet. App. C-60. The choice process in the Plan does not operate to exclude or include either group absolutely from schools or programs. A student's assignment is determined by "a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race." Pet. App. C-69. Because non-racial criteria are significant factors in assigning students, "[n]o JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track." Pet. App. C-60.[33]

Petitioner apparently assumes that any range of numbers necessarily is a quota. The court of appeals rejected that conclusion in its opinion in the *Grutter* litigation. *Grutter v. Bollinger*, 288 F.3d 732, 748 (6th Cir. 2002): ("[O]ver time, reliance on *Bakke* will always produce some percentage range of minority enrollment. And that range will always have a bottom, which, of course, can be labeled the 'minimum.' These results are the logical consequence of reliance on *Bakke* ...."). In affirming, this Court agreed that "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." 539 U.S. at 336.

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[32] *See Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). The range of minority enrollment at Amherst College was 8.5% to 13.1%; this range extends about 21.2% on either side of the mean of 10.8%. In JCPS, the range of black enrollment was 20.1% to 50.4%; this range extends about 43% on either side of the mean of 35.2%. Pet. App. C-59, n. 46.

[33] The one exception to this conclusion -- the use of race-separate lists in the application process at magnet traditional program schools -- was struck down by the district court, and is no longer in effect. Note 18, *supra*.

Indeed, it is difficult to imagine how the Board might reach its compelling goal of racial integration without paying some attention to a range of numbers.

The guidelines simply state the outer limits for the "huge array of choices and flexibility within the assignment process." Pet. App. C-24. The limits provide the student assignment staff with an essential "yardstick" that gives them "moral authority … to facilitate, negotiate and work collaboratively with principals and district staff to ensure that the plan is implemented." Tr. 2-134, 2-143, JA 122 (Todd); *see also*, Pet. App. C-18. The limits also provide a valuable benefit to parents and students: continuing certainty from year to year about the stability of the student body in the school they have chosen.

The district court correctly held that, because the racial guidelines are so broad and because "the evidence simply does not support the conclusion that [they] actually mask a tighter range, create a *de facto* quota or insulate one group of applicants from competition with another group," Pet. App. C-61, the Plan does not "operate as a quota." 539 U.S. at 335.

C. The Plan Does Not Cause Undue Harm

The Plan has a different goal, and presents different issues, than typical "affirmative action" programs. In those programs, tangible benefits might be granted to minorities to the detriment of other worthy applicants. A prestigious law school, for example, "excludes many applicants because of its goal of creating an elite community." State law does not permit the Board to exclude any student from JCPS. Under the Plan, therefore, "the Board uses race in a limited way to achieve benefits for all students" by "creating communities of equal and integrated schools for everyone." In this process, "no student is directly denied a benefit because of race so that

another of a different race can receive that benefit." Pet. App. C-62, 66, 67.

Government action based on race must not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. The Plan meets that test. The infrequent application of the racial guidelines to assign a student to one instead of another building within the Board's "communities of equal and integrated schools" does not cause undue harm.

Meredith may have a strong preference for the school to which her son was not assigned. But, as the district court noted in *Hampton II*, "matters of personal preference do not distinguish those schools in a constitutional sense." 102 F. Supp. 2d at 380, n. 43. A student who is not assigned to the JCPS school of his or her choice has not lost a government contract as in *Adarand*, or public employment as in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), or an education at a prestigious public college or graduate school as in *Gratz*, *Grutter* and *Bakke*, or even an education at a prestigious public secondary "examination school" as in *Wessman v. Gittens*, 160 F. 3d 790 (1st Cir. 1989). The student has not been denied an education, only a choice.[34] He

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[34] *See, e.g.*, *Bakke*, *supra*, at 300, n. 39, in which Justice Powell noted:

> [Bakke's] position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. [The University of California] did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

While Justice Powell used the example of a desegregation decree, his conclusion about the difference in the impact on the medical student and the pupil has equal force here.

or she still will receive an appropriate public school education at a school which has been provided by the Board with the same resources, materials, services and policies as every other school. *Supra*, pp. 2-3. The district court correctly concluded that "[b]ecause all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student." Pet. App. C-70.

The potential for "undue harm" to students is further mitigated by the extraordinary efforts that the JCPS Parent Assistance Center makes to match students with schools that meet their needs. Tr. 2-135, 2-163 (Todd); Dft. Exh. 10. If the Plan unduly harmed members of any racial group, the several surveys of parents, students, graduates and the community in this record would not demonstrate such high levels of satisfaction with JCPS and such strong support for racial integration. *Supra*, p. 9. Likewise, if the Plan unduly harmed members of any racial group, the elected members of the Board surely would have heard that complaint from constituents. They have not. Tr. 1-83, JA 114 (Haddad).

Plaintiffs stipulated that Meredith's son did not submit a timely choice application for kindergarten, attempted to enroll late at his resides school kindergarten, was assigned to another kindergarten because there was no space in his resides school kindergarten, did not appeal the denial of his application to transfer (which for elementary students is a third-level choice) from his assigned kindergarten or submit another transfer application, and did not submit a choice application for first grade for 2003-2004. Stip. par. 5, JA 20. The ungraded primary school program, which Meredith cited as the basis for her desire to transfer her son, is in fact provided at every elementary school in accordance with state law. Tr. 1-49 to 50 (Meredith), 2-69 to 70, 2-195, JA 195

(Todd); KRS 158.031. If it is true, as Meredith argued below, that her son was asked to help other students learn English, that experience in "peer teaching" provided a powerful educational benefit. Tr. 1-129 (Daeschner). Meredith did not, because she could not, present any meaningful evidence that her son was harmed because he was not assigned to the kindergarten of his choice

The district court correctly held that, as a general proposition, the "Plan uses race in a manner calculated not to harm any particular person because of his or her race," and more specifically, "Meredith's son … was not unduly harmed." Pet. App. C-67 and 66, n. 48.

D. The Board Has Considered, And The Plan In Large Part Uses, Race-Neutral Alternatives

The Board has satisfied the requirement that it consider "lawful alternative and less restrictive means." *Grutter*, 539 U.S. at 340, quoting *Wygant, supra*, at 280, n. 6. This aspect of the narrow tailoring doctrine "does not require exhaustion of every conceivable" substitute, only a "serious, good faith consideration of workable race-neutral alternatives." *Id*. at 339. As the court of appeals noted in its own *Grutter* opinion, "[a]n institution of higher education must consider race-neutral alternatives, but it need not abandon its academic mission to achieve absolute racial and ethnic neutrality." 288 F.3d at 750. The Board need not abandon its mission of educating all of the community's children, as required by state law and NCLB, to achieve absolute racial neutrality.

The Board has given serious, good faith consideration to achieving racially integrated schools through a student assignment process that would use entirely race-neutral criteria, or that would use race but not include racial guidelines. A system-wide assignment lottery "would require a 'dramatic sacrifice' in student choice, geographic

convenience and program specialization" and "could only be achieved at a huge financial cost." Pet. App. C-68. The Board concluded that "random sampling and socio-economic criterion do not provide an adequate substitute for the use of racial … identity factors." *Hunter v. Regents of the University of California*, 971 F. Supp 1315, 1330 (C.D. Cal. 1997); Tr. 1-137 to 138 (Daeschner), Tr. 2-188 to 189 (Todd). More importantly, the Board concluded that JCPS would not long remain racially integrated in the absence of racial guidelines. *See Hampton II*, *supra*, at 371, n. 28 (Board's evidence of probable resegregation absent the use of race in student assignment).

And, as the district court noted, "a vast proportion of all student assignments" under the Plan are made in a manner that "avoid[s] using race at all," because of exemptions from the racial guidelines, school geographic boundaries, and the choice application process. Pet. App. C-68. For example, the magnet traditional program schools and the middle school math-science-technology magnet programs use race-neutral lotteries. *Supra*, n. 6. Thus, the Board not only has "sufficiently considered" but actually "*used* alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements." Pet. App. C-69 (emphasis added)

Here, as in *Grutter*, this Court "cannot ignore the educational judgment and expertise of the [Board's] faculty and admissions personnel regarding the efficacy of race-neutral alternatives." 288 F.3d at 750-51. Because courts are "ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration," this Court should as in *Grutter* "assume -- along the lines suggested by Justice Powell -- that the [Board] acts in good faith in exercising its educational judgment and expertise." *Id*. at 751.

E. The Plan Is Subject To Periodic Review By Democratic Processes

The narrow tailoring doctrine requires that "race-conscious admissions policies must be limited in time." *Grutter*, 539 U.S. at 342. This Court suggested in *Grutter* that this aspect of narrow tailoring can be satisfied by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id*. The Board, together with the people of Jefferson County, will fulfill that requirement.

The Board modified the student assignment process in 1984, 1991, 1996, and 2001, and the Board will modify the Plan in the future as required by new circumstances. Tr. 2-189 (Todd). Any action taken by an elected local board of education is inherently subject to change, as the members of the Board and public perceptions change. Elections for seats on the Board are held every other year; since the Board began its periodic revisions to the decree in 1984, there have been ten such elections. Any citizen who desired to change the Plan and who thought that Jefferson County voters shared that view could have sought a seat on the Board in any of those elections; that option remains open in the future.

F. Conclusion

Some of the arguments of Petitioner and her *amici curiae*

with respect to the tailoring of the Plan might have been validly made against the previous use of the racial guidelines at the now-exempted magnet schools or the former application process at the magnet traditional program schools, if either of those questions were now before this Court. Those arguments do not apply to the student assignment process as it has been tailored to comply with the district court's opinions in *Hampton II* and this case. For all of the reasons stated by the district court, the Plan is narrowly tailored.

CONCLUSION

For the foregoing reasons, the *per curiam* decision of the Sixth Circuit affirming the opinion of the district court should be affirmed.

Respectfully submitted,

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